

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARTHA KARL,

Plaintiff,

v.

CITY OF MOUNTLAKE TERRACE, *et al.*,

Defendants.

Case No. C09-1806RSL

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION *IN LIMINE*

This matter comes before the Court on defendants' motion *in limine* to exclude various issues. As an initial matter, the Court notes that prior to filing their motions *in limine*, the parties conferred and were able to resolve several issues cooperatively, which is commendable. The remaining issues raised by defendants are discussed below.

**A. EEOC Reasonable Cause Determination, Statements About Statistics, and the EEOC File.**

Defendants seek to exclude the EEOC's letter stating that it had "determined that there is reasonable cause to believe that the Charging Party was discriminated against in violation of Title VII on the basis of gender, in that she was selected for demotion because she had recently given birth to twins." Defendants' Motion, App. B. However,

1 in the Ninth Circuit, an EEOC reasonable cause determination is *per se* admissible in a  
2 Title VII lawsuit. See, e.g., Plummer v. Western Int'l Hotels Co., Inc., 656 F.2d 502, 505  
3 (9th Cir. 1981). Although defendants urge the Court to depart from Plummer, that  
4 decision is binding. Accordingly, defendants' request to exclude the determination is  
5 denied.

6 Defendants urge that even if the Court admits the EEOC determination, it should  
7 exclude the EEOC file, including all documents and notes, as hearsay. Neither party has  
8 submitted those documents or explained their relevance. In the absence of that  
9 information, the Court is unprepared to rule on the documents. If plaintiff seeks to  
10 introduce documents from the file during trial, she should file a motion *in limine* that  
11 includes specific documents and argument about why the documents are relevant and  
12 admissible.

13 Defendants also seek to preclude questions regarding "how often the EEOC makes  
14 adverse findings and related statistical information." Motion at p. 5. Plaintiff has listed  
15 the EEOC investigator as a potential witness, so there may be a proper foundation to  
16 describe the EEOC's process. That information may also be relevant if plaintiff  
17 introduces the EEOC's finding. Therefore, the Court will not exclude testimony  
18 regarding the EEOC's processes. Neither party has filed any EEOC statistical  
19 information, so it is unclear what plaintiff may offer. The Court will likely exclude  
20 evidence regarding statistics as irrelevant and potentially confusing and prejudicial.

21 **B. References to the "Police Brotherhood."**

22 Plaintiff seeks to introduce evidence that she felt like part of the police family and  
23 how "impactful and emotionally damaging her expulsion from that brotherhood was."  
24 Response at p. 5. Defendant does not object to that testimony, but argues that plaintiff  
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1 should not be permitted to suggest or invoke the “thin blue line urban legend.” Response  
2 at p. 2. Because it does not appear that plaintiff intends to invoke that “urban legend,”  
3 defendants’ request is denied.

4 **C. Union Documents.**

5 Defendants seek to exclude two documents, listed in plaintiff’s pretrial statement,  
6 pertaining to plaintiff’s union grievance: (1) a letter from Hugill to a union representative,  
7 and (2) a letter to the union representative from a source plaintiff does not identify.  
8 Defendants also seek to exclude testimony about the documents. Plaintiff has not shown  
9 that either document is relevant. Although she argues that the fact that she filed a  
10 grievance and her lack of union rights are relevant, she can testify about those facts. At  
11 this point, the letters appear to be cumulative, potentially confusing, and unnecessary.<sup>1</sup>

12 **D. 2008 Draft Report.**

13 Defendants seek to exclude a draft report dated April 2008 that purports to set  
14 forth the results of a 2007-2008 survey. The draft report, consisting of 33 pages, contains  
15 the following line: “Employees are treated differently based on gender.” Declaration of  
16 Joseph Schaeffer, (Dkt. #111), Ex. A at p. 12. That statement is unexplained,  
17 unattributed, and without context. Moreover, the survey was conducted before Chief  
18 Wilson began his term. Under those circumstances, the draft survey’s relevance appears  
19 minimal and it could be highly prejudicial. Therefore, it is excluded.

20 **E. Suit by Cynthia Caterson.**

21 Defendants seek to exclude testimony that Cynthia Caterson won a lawsuit against  
22 her employer, the City of Lynnwood. Plaintiff alleges that the information is relevant  
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24 <sup>1</sup> Based on the descriptions, neither document appears to be plaintiff’s actual  
25 grievance, which this order does not preclude plaintiff from introducing.

1 because Caterson was not hired by the City of Mountlake Terrace. Plaintiff states that  
2 Hugill testified that Caterson wrote a letter to the editor regarding police funerals, and as  
3 a result, she was not hired by the City. Defendants counter that Hugill testified that the  
4 letter was not the reason the City did not hire Caterson. Plaintiff's suit is not based on  
5 any alleged pattern or practice of violating employees' and/or potential employees' First  
6 Amendment rights. Rather, the jury will be asked to consider the motivations in  
7 plaintiff's particular case. Therefore, the Court will exclude evidence and testimony on  
8 this issue because it is not relevant and could be highly prejudicial.

9 **F. Uncontested Issues.**

10 The Court will exclude, as uncontested, information regarding Chief Wilson's  
11 brother. Similarly, the Court will exclude evidence about settlement negotiations. The  
12 Court will also exclude any reference to defendants' privilege log, items therein, or to  
13 attorney client privileged matters.

14 Defendants have moved to exclude arguments regarding the inability to understand  
15 discrimination experienced by individuals of a different sex. They have not identified  
16 specifically what they seek to exclude with that reference, but plaintiff responds that she  
17 does not intend to offer such evidence.

18 **G. Chief Smith; Wender Litigation.**

19 Defendants seek to exclude testimony and documents regarding why Chief Smith  
20 ended his employment with the City. Plaintiff argues that the information is relevant  
21 because her testimony in the Wender litigation contradicted Chief Smith's testimony  
22 about why he left. Even if that were true, it is irrelevant. Moreover, although plaintiff  
23 claims that her testimony on that subject was protected speech, the reasons why Chief  
24 Smith's employment ended appear to be a personnel issue, so testimony about that issue  
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1 is unprotected. Accordingly, the Court will exclude evidence about why Chief Smith  
2 ended his employment with the City.

3 The Court does not intend to have a mini-trial on the Wender litigation and will  
4 offer a limiting instruction on the issue. Plaintiff also contends that she may call Wender  
5 as a rebuttal witness. The relevance of that testimony is now difficult to ascertain, so if  
6 plaintiff seeks to call him as a rebuttal witness, she must request the Court's permission  
7 and be prepared to make an offer of proof.

8 The Court will exclude news articles about the Wender litigation as irrelevant and  
9 potentially confusing and prejudicial. The parties are not precluded from questioning  
10 witnesses about whether they saw media coverage about the litigation, but the news  
11 articles are excluded. The Court also excludes any testimony about the amount of the  
12 settlement, although the parties can introduce evidence about the fact of the settlement  
13 and its timing.

14 Finally, defendants seek to preclude introduction of the deposition transcripts from  
15 the Wender litigation, and they are excluded as irrelevant from the parties' cases in chief.  
16 However, each party may use them in examining witnesses if consistent with the Rules of  
17 Evidence.

18 **H. Merit Raises and Budget Information.**

19 Defendants seek to exclude as irrelevant evidence that City directors apparently  
20 received merit raises between 2005 and 2009. Plaintiff counters, "The fact that the City  
21 directors and other higher officials, including Scott Hugill and Pete Caw, received  
22 substantial raises during the same time period that they demoted Ms. Karl undercuts the  
23 credibility of their arguments, and is directly relevant and admissible evidence of  
24 retaliatory motivation and/or discrimination." Response at p. 7. Plaintiff contends that  
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1 the fact that raises were given undermines defendants' assertion that her demotion was  
2 necessitated by budgetary constraints. Plaintiff has accused only Caw, Hugill, and Chief  
3 Wilson of having discriminatory and retaliatory animus towards her, and only they and  
4 City Manager John Caulfield were allegedly involved in the personnel actions against her.  
5 Plaintiff has made no foundational showing about who made the decisions to grant the  
6 raises or that those people were the same ones who made the decision to transfer plaintiff  
7 or to discharge her. In the absence of that showing, evidence about the raises is excluded  
8 as irrelevant and prejudicial.

9 Defendants also seek to exclude "details of [the] city budget unknown to Chief  
10 Greg Wilson," including documents related to the City Council's processes. Motion at p.  
11 8; Reply at p. 5. Those documents, though not submitted to the Court, are likely  
12 irrelevant and potentially confusing to the jury and they are excluded on that basis. The  
13 parties may introduce evidence about the facts and documents Chief Wilson relied on and  
14 knew about.

15 **I. Personnel Documents of City Officials and of Plaintiff.**

16 Defendants seek to exclude "performance reviews or information from reviews of  
17 Hugill, Caw, Wilson or Caulfield" as irrelevant and "collateral." Motion at p. 8. Plaintiff  
18 counters that she does not anticipate offering those documents but may seek to use them  
19 for impeachment purposes. Depending on the circumstances, the Court may allow those  
20 documents for impeachment purposes.

21 Similarly, plaintiff counters that other personnel documents regarding the same  
22 individuals might be "relevant to show discriminatory or retaliatory treatment." Response  
23 at p. 7. That vague statement, untethered to any specific documents, is insufficient at this  
24 time to show relevance or that such relevance outweighs the potential prejudice and the  
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1 intrusion on employees' privacy interests. Therefore, personnel documents will be  
2 excluded absent an adequate showing of relevance.

3 Defendants also seek to exclude documents related to plaintiff's positive  
4 performance under the previous Chief of Police, including performance evaluations and  
5 positive letters. Defendants argue that her prior performance is irrelevant because Chief  
6 Wilson measured plaintiff's performance "against his own expectations as the new  
7 Chief." Motion at p. 8. They also argue that the budget-driven reason to transfer her had  
8 nothing to do with her performance, and her poor performance as a records specialist was  
9 unrelated to her prior performance as an administrator assistant. Defendants are not  
10 precluded from making those arguments to the jury. Moreover, plaintiff has countered  
11 that defendants' reasons for the adverse actions are untrue and pretextual, and her  
12 previous performance is relevant to those issues. The fact that only a few months elapsed  
13 between when Chief Wilson assumed his position, transferred plaintiff, then discharged  
14 her underscores the relevance of her performance under the previous chief. Therefore,  
15 her prior performance is relevant and the Court will not exclude all of the performance  
16 related documents. However, plaintiff has listed documents dating back to 2003, five  
17 years before the adverse actions in 2008, and the Court may exclude the 2003-2005  
18 documents as cumulative and temporally remote.<sup>2</sup>

19 **J. Testimony of Former City Records Specialists.**

20 The parties agree that the declaration of former records employee Cindy Thomas is  
21 not admissible, but disagree regarding whether she and another former records specialist  
22 should be permitted to testify. Defendants contend that their testimony is not relevant to  
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24 <sup>2</sup> It is difficult to make a definitive ruling about the performance related documents  
25 since the parties did not submit them.

1 Chief Wilson's training expectations and recommendations in 2008 when neither of the  
2 two employees was working for the City. However, according to Thomas's declaration,  
3 she worked for the City until 2008, so she has experience during the relevant time frame.  
4 Furthermore, the experience of other records specialists is relevant to whether Chief  
5 Wilson's expectations were reasonable or whether they were unrealistic and a pretext for  
6 an unlawful motive. Therefore, the Court will not exclude the testimony of the two  
7 former records specialists.

8 **K. Plaintiff's Medical Records, Alleged PTSD, and Litigation Related Stress.**

9 Defendants seek to exclude as hearsay the treatment and billing records of  
10 therapist and nurse practitioner Ann Goett. Defendants also seek to exclude Goett's  
11 opinion that plaintiff suffered from post traumatic stress disorder ("PTSD") because, they  
12 argue, there is no foundation for the diagnosis. Defendants note that plaintiff's condition  
13 does not meet the definition of PTSD and that two other doctors, including plaintiff's  
14 psychologist, have opined that plaintiff did not have PTSD. The Court will hear oral  
15 argument on this issue closer to the trial and may require Ms. Goett to testify at that  
16 pretrial hearing.

17 Defendants also seek to preclude plaintiff from recovering damages for litigation-  
18 induced stress. Plaintiff concedes that she will not seek those damages, and argues that  
19 both sides should be precluded from offering evidence and testimony on the subject.  
20 "Just as a plaintiff should not recover additional damages because of litigation stress, the  
21 defense is not entitled to discount her damages simply because she brought a lawsuit and  
22 they defended the claim." Response at p. 15. Therefore, the Court will preclude plaintiff  
23 from seeking damages for litigation induced stress, and will preclude all parties from  
24 presenting evidence or argument about the subject.



**L. The Termination and Severance Letters and Related Discussions with Counsel.**

Defendants seek to exclude the termination and severance letters given to plaintiff in January 2009, the offered and unsigned release of claims, and any reference to communications with counsel about the letters. In response to the motion, plaintiff concedes that post termination settlement negotiations are inadmissible under Fed. R. Evid. 408. She does not contest defendants' assertion that she cannot inquire about the City's discussions with its own counsel about the letters, including the fact that the City sought legal advice. The fact that a party consulted counsel as well as the content of the communications are inadmissible. See, e.g., Hickman v. Taylor, 329 U.S. 495 (1947). In their reply, defendants apparently concede that the letters themselves are admissible.

Therefore, the only remaining issue is whether the City's proffered release is admissible. Although defendants contend that it is an inadmissible settlement offer under Fed. R. Evid. 408, the Ninth Circuit has held, "Severance pay packages contingent upon a release of claims which are offered contemporaneously with the notice of termination are not covered by [Rule 408] and are admissible." Mundy v. Household Fin. Corp., 885 F.2d 542, 546 (9th Cir. 1989). The Ninth Circuit has drawn a distinction between offers that are contemporaneous with the termination of employment and offers made in the context of post-termination settlement negotiations regarding issues that have ripened into disputes. Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338, 1342 (9th Cir. 1987); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1290-91 (9th Cir. 2000). Although the briefing does not specifically address the timing, defendants apparently concede that the letters and the release were provided contemporaneously with the termination. Therefore, the Court will not exclude them under Rule 408.

1   **M.   Other Employees' Records, Training, and Incidents.**

2           Defendants seek to exclude evidence regarding personnel actions against other  
3 employees. In their motion, defendants contend that plaintiff intends to elicit testimony  
4 and/or present documents about numerous other listed employees. In response, plaintiff  
5 addressed the relevance of performance based evidence regarding only a single employee:  
6 records specialist Tammy Custer. Therefore, the Court will assume that plaintiff  
7 concedes the inadmissibility of information regarding the other individuals and will focus  
8 on Custer.

9           Plaintiff argues that she and Custer were similarly situated, but after the two had a  
10 workplace disagreement, plaintiff was sent home and ultimately terminated, while Custer  
11 was not. Defendants' treatment of Custer is relevant to plaintiff's claim of retaliation, and  
12 the probative value likely outweighs the potential prejudice. Defendants also urge that if  
13 the Court is inclined to admit evidence regarding Custer, then the Court should limit that  
14 evidence to the six month period following plaintiff's termination. The Court agrees that  
15 information regarding Custer's employment after the six month mark, including her  
16 current performance, is of marginal relevance and could be confusing to the jury and  
17 highly prejudicial. Therefore, the Court will permit plaintiff to introduce documents and  
18 testimony regarding Custer's performance and discipline (or lack thereof) until six  
19 months after plaintiff's termination.

20           Defendants also seek to exclude evidence regarding the training records of other  
21 employees. It does not appear that there are any standard training manuals or documents,  
22 which the Court might admit. Rather, plaintiff intends to present "[p]ersonnel records  
23 documenting the training and disciplinary approach" the City took with other,  
24 unidentified employees. Response at p. 9. That reference is too vague to permit a  
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1 definitive ruling. However, in light of the fact that plaintiff is arguing that her training  
2 and the standards imposed on her were unique, it appears, based on the limited record,  
3 that the training records of other employees may be cumulative and unnecessary. That is,  
4 plaintiff need not present scores of personnel records to prove a negative: that those  
5 records do not contain evidence that the same standards were imposed on other  
6 employees. Testimony about the training will suffice.

7 Defendants also seek to preclude plaintiff from testifying about conduct or  
8 incidents she did not witness. Plaintiff counters that she “is entitled to testify on other  
9 incidents of which she became aware not for hearsay purposes, (the truth of those  
10 incidents), but for other reasons such as notice, futility, and motivation.” Response at  
11 p. 12. Neither party identifies those vaguely alluded to incidents, and the Court cannot  
12 imagine their relevance. Moreover, the fact that other employees may have been  
13 retaliated against or discriminated against by other decision makers is of no relevance and  
14 could be highly prejudicial. Accordingly, the Court will not permit plaintiff to testify  
15 about “other incidents of which she became aware.”

16 **N. Questions and Argument About “Stereotyping.”**

17 Defendants seek to exclude testimony and questions about “stereotyping” because  
18 plaintiff must prove intentional discrimination, and because plaintiff will not offer expert  
19 evidence about stereotypes. However, the issue of stereotyping is within the  
20 understanding of a typical juror. If the witnesses questioned about the topic do not  
21 understand the terms, they can so state. Accordingly, using the term will not unduly  
22 confuse the jury.

23 Moreover, stereotyping based on sex is evidence of sex discrimination, Price  
24 Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989), and precluding plaintiff from using

1 terms like “stereotype” would unfairly limit her ability to prove her case. Finally,  
2 although defendants argue that plaintiff has not shown that stereotyping played a role in  
3 this case, they can make that argument to the jury. The Court will not exclude questions  
4 and testimony about stereotypes.

5 **O. Handwritten Notes.**

6 During discovery, the parties apparently produced handwritten notes that  
7 defendants seek to exclude as hearsay. Without supplying or identifying the documents,  
8 the Court cannot provide a definitive ruling on their admissibility. However, the Court  
9 indicates that the notes can be admitted only if a witness properly authenticates them, a  
10 proper foundation is laid, and they are not hearsay or an exception applies. Otherwise,  
11 the notes cannot be read into the record, admitted, or referenced.

12 **P. Punitive Damages: Caw and Hugill’s Net Worth and the “Golden Rule.”**

13 Defendants seek to exclude evidence regarding Caw’s and Hugill’s net worth. The  
14 Court excludes evidence of Hugill’s net worth because he is no longer a party.

15 As for the City, punitive damages are not available against municipalities unless  
16 specifically authorized by statute. See, e.g., City of Newport v. Fact Concerts, Inc., 453  
17 U.S. 247, 271 (1981). Plaintiff has not identified any statute that permits punitive  
18 damages against the City. Punitive damages are not available under the Washington Law  
19 Against Discrimination. See, e.g., Daily v. North Coast Life Ins. Co., 129 Wn.2d 572,  
20 574 (1996). Therefore, plaintiff cannot pursue an award of punitive damages against the  
21 City. Similarly, as defendants request, the Court will preclude plaintiff from arguing that  
22 the jury should “teach the City a lesson” or similar arguments designed to inflame the  
23 passions of the jury.

24 Although individuals cannot be held liable under Title VII, see, e.g., Greenlaw v.  
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1 Garrett, 59 F.3d 994, 1001 (9th Cir. 1995), Section 1983 permits an award of punitive  
2 damages against individuals. See, e.g., Bell v. Clackamas County, 341 F.3d 858 (9th Cir.  
3 2003). An individual's wealth and ability to pay may be relevant considerations. Id. at  
4 868. However, the Court will reserve ruling on this issue until the pretrial conference.

5 **Q. References to Remedies Not Sought.**

6 Defendants seek to preclude plaintiff from testifying about other remedies she has  
7 never pled or sought, including an apology, changes in police department practices, etc.  
8 Defendants argue that such testimony is irrelevant, unfairly appeals to sympathy, and is  
9 more prejudicial than probative. The Court will rule on objections in this area as they  
10 arise at trial.

11 **R. Out of Court Statements.**

12 Defendants seek an order precluding plaintiff from asking questions beginning  
13 with, "Did you previously tell . . ." Motion at p. 16. Because of the vague and  
14 contingent nature of this request, it is better addressed through objections during trial.

15 **S. Witnesses Al Compaan and Debbie Human.**

16 Defendants contend that witnesses Al Compaan and Debbie Human should be  
17 excluded because plaintiff failed to disclose them in her initial disclosures or written  
18 discovery. According to plaintiff's deposition testimony, Ms. Human interviewed her for  
19 a position with Public Works. Al Compaan is the Chief of Police of the Edmonds Police  
20 Department and contacted Chief Wilson about plaintiff's job application.

21 Although defendants contend that plaintiff failed to disclose the witnesses'  
22 identities in written discovery, they do not identify any discovery request to which their  
23 identities were relevant. Therefore, the Court will analyze the issue as a failure to  
24 supplement initial disclosures, for which the Court may impose sanctions. Fed. R. Civ. P.

1 26(a)(1)(A)(i); Fed. R. Civ. P. 37(c)(1)(C). It appears that plaintiff's failure to  
2 supplement was harmless because the identity of both witnesses was disclosed in  
3 depositions. Defendants have not identified any prejudice that they have suffered as a  
4 result. Accordingly, the Court will not preclude the witnesses from testifying based on  
5 the failure to supplement the initial disclosures.

6 For all of the foregoing reasons, defendants' motion *in limine* (Dkt. #99) is  
7 GRANTED IN PART AND DENIED IN PART as set forth above.<sup>3</sup>

8  
9 DATED this 2nd day of June, 2011.

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12 Robert S. Lasnik  
13 United States District Judge  
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21 <sup>3</sup> The Court notes that the findings and conclusions in this order, like all rulings *in*  
22 *limine*, are preliminary and can be revisited at trial based on the facts and evidence as  
23 they are actually presented. See, e.g., Luce v. United States, 469 U.S. 38, 41 (1984)  
24 (explaining that a ruling *in limine* "is subject to change when the case unfolds,  
25 particularly if the actual testimony differs from what was contained in the proffer. Indeed  
even if nothing unexpected happens at trial, the district judge is free, in the exercise of  
26 sound judicial discretion, to alter a previous *in limine* ruling."). Subject to these  
principles, the Court issues this ruling for the guidance of the parties.